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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY FRANK GIELLA,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the District Court's denial of a defendant's request for use immunity for a severed co-defendant violates the defendant's Sixth Amendment Right to compulsory process and Fifth Amendment Right to due process of law insuring a fair trial.

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A. The decision below conflicts with decisions of other Circuit Courts of Appeal which have approved and in fact required the District Courts to grant the request for use immunity in order to insure that a defendant's Fifth and Sixth Amendment Rights are fully protected.

B. This issue and the decision below directly affects a defendant's constitutional right to compulsory process as guaranteed by the Sixth Amendment to the Constitution of the United States of America and also directly affects a defendant's Fifth Amendment right to due process of law insuring a fair trial.

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ANTHONY FRANK GIELLA,
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VS.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, ANTHONY FRANK GIELLA, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 2, 1982.

CITATION TO OPINION BELOW

The opinion in the United States Court of Appeals for the Fifth Circuit in this case is cited as United States vs. Heffington, 582 F.2d 1075 (5th Cir. 1982), and the opinion appears as an Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 2, 1982, a timely petition for rehearing was denied on August 30, 1982, and this Petition for Certiorari was filed within sixty days of that date in accordance with Rule 20.1 of the Rules of the Supreme Court of the United States. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

RULES AND STATUTES INVOLVED

As provided by Supreme Court Rule 21.1(f), the verbatim quotation of the

following Statutes is set forth in Appendix B hereto.

United States Constitution, Amendment V

United States Constitution, Amendment VI

STATEMENT OF THE CASE

The Petitioner and three other individuals were indicted by a Grand Jury for the Northern District of Texas on the twenty-sixth day of March, 1981. All four were charged in a thirteen-count indictment with conspiracy (18 U.S.C. §371), wire fraud (18 U.S.C. §1343) and inducement to travel in interstate commerce in furtherance of a fraud (18 U.S.C. §2314). After entry of "not guilty" pleas at arraignment, the Trial Court held pre-trial hearings on the seventh day of May, 1981. Trial commenced on the nineteenth day of May, 1981; said trial resulting in a conviction of the Petitioner on all

thirteen counts of the indictment. Petitioner filed his notice of appeal on the twenty-sixth day of June, 1981. The judgment of the Fifth Circuit Court of Appeals was entered on the second of August, 1982, in an opinion authored by Judge Garza affirming the conviction. A petition for rehearing was denied August 30, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

The Petitioner, on appeal, contended that the Trial Court's denial of his motion for judicial use immunity for a severed co-defendant violated Petitioner's Sixth Amendment Right to compulsory process and his Fifth Amendment Right to due process of law. The Fifth Circuit Court of Appeals in its opinion rejected the defendant's claim that the requirements of Government of Virgin Islands vs. Smith, 615 F.2d 964

(3rd Cir. 1980), had been met and the Trial Court should have granted the defendant's request. That decision is in conflict with the Third Circuit Court of Appeals.

The facts of this case arise from a series of transactions in which Petitioner and the other individuals played a part in an attempted sale of gold bullion during the last five months of 1980. The moving party on this series of events was co-defendant William "Billy" Carr. Mr. Carr filed a motion to sever prior to trial. It was granted by the Court and he was not tried with the Petitioner and the other two co-defendants. The basis of the transactions which formed the basis of the indictment involved Billy Carr providing a large amount of gold, which was in his possession and which were to be sold by defendants Heffington and White to

investors. The gold was stored at the Broward Commercial Warehouse in Fort Lauderdale Florida. That warehouse was operated by Petititoner Anthony Giella. According to Petitioner, Carr showed him a bar from one of many cases delivered to the warehouse. It appeared to be gold bullion and Carr told Petitioner it was gold. From this point throughout the entire series of transactions, Petitioner asserted that he at all times believed and relied upon the co-defendant Carr as to the accuracy and authenticity of any statements or representations made concerning said product. The entire series of transactions, from the beginning until the end in January of 1981, centered and revolved around co-defendant Billy Carr.

The Petitioner's position in his motion for a grant of use immunity was based on

the belief that only Billy Carr could and would give exculpatory evidence relieving the Petitioner of any criminal liability in any of the transactions since he was the only person upon whom Petitioner relied. However, since Mr. Carr was named in the indictment, he had a right to assert his Fifth Amendment privilege against self-incrimination and would only testify for Petitioner under a grant of use immunity. The Petitioner, relying upon the case of Government of Virgin Islands vs. Smith, supra, met all of the factual requirements of that case which would have authorized the Trial Court granting the motion for use immunity. The Trial Court's denial of said motion effectively barred co-defendant Carr's critical testimony from use by Petitioner in his trial and directly

affected his ability to defend himself against the charges.

REASONS FOR GRANTING CERTIORARI

I.

The District Court's denial of Petitioner's request for use immunity for a severed co-defendant presents a conflict among the Circuit Courts of Appeal; and raises a signficant issue involving substantial constitutional rights specifically the Fifth and Sixth Amendment to the Constitution of the United States of America.

A. The decision below conflicts with decisions of other Circuit Courts of Appeal which have approved and in fact required the District Courts to grant the request for use immunity in order to insure that a defendant's Fifth and Sixth Amendment Rights are fully protected.

The Petitioner, prior to trial, formally requested that the severed co-defendant Billy Carr be given judicial immunity by the Trial Court so that he would be available to testify for Petitioner in his trial. Petitioner, relying upon Government of Virgin Islands vs. Smith, 615 F.2d 964 (3rd Cir. 1980), made a record presenting factual evidence satisfying the requirements which that Court held were necessary before any court could grant judicial use immunity to a co-defendant.

Those requirements are:

1. The defendant must properly request the Trial Court, prior to trial, for a grant of immunity naming the witness and the nature of the testimony sought.

2. The defendant must show to the Trial Court that the witness is physically available to testify and would testify with

a grant of judicial immunity and would not be available, i.e., would exercise his Fifth Amendment Right without it.

3. The evidence sought from the witness must be clearly exculpatory.

4. The testimony of the witness must be essential to the defendant's case.

5. The Government must have no strong countervailing interest.

The record in the Trial Court satisfied all of the requirements set out above. The Trial Court after conducting the evidentiary hearing on Petitioner's motion denied the request and that ruling was approved by the Fifth Circuit Court of Appeals.

The Third Circuit Court of Appeals in United States vs. Herman, 589 F.2d 1191 (3rd Cir. 1978), in deciding the issue of

the appropriateness of granting judicial immunity stated:

A case might be made that the Court has inherent authority to effectuate the defendant's compulsory process right by conferring a judicially fashioned immunity upon a witness whose testimony is essential to an effective defense. [at 1204]

In Government of Virgin Islands vs. Smith, supra, the Third Circuit held that if a defendant properly establishes the above set out five requirements, Chambers vs. Mississipppi, 410 U.S. 284, 93 S.Ct. 1038 (1973), may require the use of judicially fashioned immunity to insure due process of law. In that case they said that judicial use immunity should have been given and reversed the case. The Third Circuit has followed the decision of Government of Virgin Islands vs. Smith,

supra, in subsequent cases and that remains the status of the law in that Circuit.

The Second, Fourth, Sixth, and Ninth Circuits have addressed the issue of judicial use immunity and while denying it in the specific case before them, have left the door open as to whether or not immunity would ever be available. See United States vs. Turkish, 623 F.2d 769 (2nd Cir. 1980); United States vs. Klauber, 611 F.2d 512, (4th Cir. 1979); United States vs. Lenz, 616 F.2d 960 (6th Cir. 1980); United States vs. Alessico, 528 F.2d 1079 (9th Cir. 1976).

The Fifth, Seventh, Eighth and D.C. Circuits have addressed the issue of judicial use immunity and rejected a trial court's right to grant use immunity. See United States vs. Chagra, 669 F.2d 241

(5th Cir. 1982); United States vs. Thevis, 665 F.2d 616 (5th Cir. 1982); In Re: Daley, 549 F.2d 469 (7th Cir. 1976); United States vs. Graham, 548 F.2d 1302 (8th Cir. 1976); Pearl vs. United States 361 F.2d 531 (D.C. Cir. 1966).

It is clear that the issue of judicial use immunity is being raised more and more frequently in the courts throughout the United States. In Petitioner's case this Honorable Court has a unique opportunity to address the issue squarely with a record below that is factually complete and specifically addressed to the issue of the granting of judicial use immunity. Contrary to cases decided in the other circuits and cases where certiorari has been denied, Petitioner believes that this case presents factually and legally the issue in clear context. Thus, this Court

should grant this Petition for Writ of Certiorari and deal directly with this very critical issue.

B. This issue and the decision below directly affects a defendant's constitutional right to compulsory process as guaranteed by the Sixth Amendment to the Constitution of the United States of America and also directly affects a defendant's Fifth Amendment right to due process of law insuring a fair trial.

The Petitioner both at the Trial Court level and the Fifth Circuit Court of Appeals level specifically raised the issue of the denial of his Sixth Amendment Right to compulsory process and his Fifth Amendment Right to due process of law. The record is complete and the issue was properly presented to the Trial Court and the Fifth Circuit Court of Appeals.

The Fifth Circuit Court of Appeals subsequent to the Trial Court's decision in Petitioner's case in United States vs. Thevis, supra, decided that the Fifth Amendment Right to due process did not require or authorize a Trial Court to grant judicial use immunity.

Subsequent to the Trial Court's decision in Petitioner's case the Fifth Circuit Court of Appeals in United States vs. Chagra, supra, address the issue of the right of compulsory process being violated by a Trial Court's denial of the request for a grant of judicial use immunity and determined in that case that there is no violation of a defendant's Sixth Amendment Rights by a Trial Court's denial of such a request.

However, in Government of Virgin Islands vs. Smith, supra, the Third

Circuit Court of Appeals specifically held that the Fifth Amendment Right to due process of law insuring a fair trial required the use of judicially fashioned immunity for a co-defendant in order to insure that the defendant at the trial level receive a fair trial.

The Court in United States v. Turkish, supra; United States vs. Klauber, supra; United States vs. Lenz, supra; United States vs. Alessico, supra, while specifically rejecting the request in those cases held that Chambers vs. Mississippi, supra, might require the use of judicially fashioned immunity to insure that a person's Fifth Amendment Right to due process of law be protected.

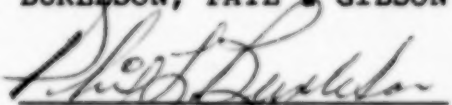
Therefore, the conflicting opinions throughout the various Circuit Courts of Appeals on these two constitutional rights

creates significant confusion at the Trial Court level and causes significant adverse affects on the litigants before those courts. Thus, this Court has a unique opportunity and almost an obligation to once and for all settle this issue concerning the Fifth and Sixth Amendment Rights of defendants.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,
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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed to Mr. Richard Stephens, Assistant United States Attorney, 1100 Commerce Street, Dallas, Texas 75242; Mr. Wade Hampton McCree, Jr., Solicitor-General, Department of Justice, Suite 5143, Ninth and Constitution Avenue, N.W., Washington, D.C. 20530, on this the 16 day of November, 1982.

PHIL L. BURLESON
MICHAEL P. GIBSON

UNITED STATES of America
Plaintiff-Appellee,
v.
Walter Merle HEFFINGTON, Russell Preston White, Jr. and Anthony Frank Giella, Defendants-Appellants.

No. 81-1296.

United States Court of Appeals,
Fifth Circuit.

Aug. 2, 1982.

Defendants were convicted in the United States District Court for the Northern District of Texas, Robert M. Hill, Jr., in prosecution for alleged wire fraud and conspiracy, and defendants appealed. The Court of Appeals, Garza, Circuit Judge, held that: (1) alleged prosecutorial misconduct before grand jury did not entitle defendants to dismissal of indictments; (2) refusal to grant use immunity to former codefendant did not violate defendants' Sixth Amendment right to compulsory process and their Fifth Amendment right to due process, even though such refusal allegedly precluded defendants from introducing exculpatory evidence; (3) defendants' convictions on multiple counts of wire fraud did not violate double jeopardy clause, even though defendants claimed not to have foreseen nor intended number of transfers of funds as occurred in course of transaction and claimed to have had no control over the fact that funds were transferred at different times; (4) where co-defendant's statements did not directly allude to defendants, admission of such

statements in wire fraud and conspiracy prosecution did not violate defendants' Sixth Amendment right to confrontation; (5) trial court adequately instructed on conspiracy charge and refusal to give defendants' requested charge on effect of "presence at scene of crime" did not deny defendant fair trial; (6) there was no error in considering defendant's own statements as independent evidence that conspiracy existed and that he was a member of it, and thus no error occurred in permitting Government to introduce testimony of co-conspirators against defendant; and (7) evidence was sufficient to support convictions.

Affirmed.

1. Indictment and Information

Improper remarks made by prosecutors can justify dismissal of indictment only if such remarks so biased grand jurors that their votes were based upon their bias.

2. Grand Jury

Review of entire transcript of grand jury testimony established that prosecutors neither made prejudicial remarks violating independence of grand jury nor improperly became "unauthorized" person by giving testimony, but record established that actions of prosecutor were clearly within bounds of his role and that such actions could not have prejudiced or biased grand jury. Fed.Rules Cr.Proc. Rule 6(d), 18 U.S.C.A.; U.S.C.A.Const.Amend. 5.

3. Constitutional Law
Criminal Law

Refusal to grant use immunity to former co-defendant did not violate defendants'

Sixth Amendment right to compulsory process and their Fifth Amendment right to due process, even though such refusal allegedly precluded defendants from introducing exculpatory evidence. U.S.C.A.Const. Amends. 5, 6.

4. Criminal Law

Defendants' convictions on multiple counts of wire fraud did not violate double jeopardy clause, even though defendants claimed not to have foreseen nor intended number of transfers of funds as occurred in course of transactions and claimed to have no control over the fact that funds were transferred at different times, where each separate count was based on separate communication, and separate records of each of the separate wire transfers were admitted to prove each separate offense. U.S.C.A. Const.Amends. 5, 6; 18 U.S.C.A. § 1343.

5. Conspiracy
Telecommunications

Evidence on elements of agreement and on intend was sufficient to support convictions for wire fraud and for conspiracy to defraud. 18 U.S.C.A. §§ 371, 1343, 2314.

6. Criminal Law

Defendant could not successfully claim on appeal that denial of continuance was erroneous because it precluded him from securing counsel free from conflict of interest where record failed to show belief of defendant at time of trial that conflict of interest existed and showed that continuance was sought for other reasons.

7. Criminal Law

Statements of defendant made during grand jury testimony and to investigating

FBI agent were admissible in criminal prosecution as admission by party. Fed.Rules Evid. Rule 801(d)(2)(A), 28 U.S.C.A.

8. Criminal Law

Where co-defendant's statement did not directly allude to defendants, admission of such statements in wire fraud and conspiracy prosecution did not violate defendants' Sixth Amendment right to confrontation. U.S.C.A.Const.Amend. 6.

9. Telecommunications

Evidence indicating that acts alleged in substantive wire fraud counts could have reasonably been foreseen as necessary or natural consequence of conspiracy was sufficient to support conviction on the substantive counts against defendant who operated warehouse and never dealt with purchasers during "sale of "gold". 18 U.S.C.A. §§ 371, 1343, 2314.

10. Criminal Law

So long as charge accurately reflects law and facts, district judge is vested with broad discretion in formulating his charge, and Court of Appeals will not lightly disturb his judgment.

11. Conspiracy
Criminal Law

Trial Court adequately instructed on conspiracy charge, and refusal to give defendants' requested charge on effect of "presence at scene of crime" did not deny defendant fair trial. U.S.C.A.Const.Amend. 5.

12. Criminal Law

There was no error in considering defendant's own statements as independent evidence that conspiracy existed and that he was member of it, and thus no error occurred in permitting Government to introduce testimony of co-conspirators against defendant. Fed.Rules Evid. Rules 801, 801(d)(2)(E), 28 U.S.C.A.

13. Conspiracy

Evidence as to defendant's knowledge of and participation in alleged conspiracy to defraud was sufficient to support conviction.

Appeals from the United States District Court for the Northern District of Texas.

Before GARZA, POLITZ and WILLIAMS, Circuit Judges.

GARZA, Circuit Judge:

Defendants-Appellants, Walter Merle Heffington, Anthony Frank Giella and Russell Preston White, Jr., appeal from convictions arising from a thirteen-count indictment filed in March 1981. The indictment charged appellants with conspiracy to defraud in violation of 18 U.S.C. §371 (Count 1), inducing investors to travel in interstate commerce in the execution of a scheme to defraud in violation of 18 U.S.C. §2314 (Counts 2 through 4), causing the interstate transportation of checks knowing such checks to have been taken by fraud in violation of 18 U.S.C. § 2314 (Counts 5 and 6), and causing the interstate wire transfer of funds pursuant to the fraudulent scheme in violation of 18 U.S.C. §

1343 (Counts 7 through 13). Appellants were tried jointly in May, 1981. Heffington and Giella were convicted on all thirteen counts; White was convicted on the conspiracy count only. Appellant Heffington was fined $10,000.00 and received a sentence of three years imprisonment on each count to run concurrently for a total of three years imprisonment and a $10,000.00 fine. Appellant White received a sentence on Count 1 to three years imprisonment and was fined $10,000.00. Appellant Giella received a sentence on Count 1 of five years imprisonment and was fined $10,000.00; on each of Counts 2 through 4, he received a sentence of ten years and was fined $10,000.00; on each of Counts 5 and 6, he received a sentence of ten years imprisonment and was fined $10,000.00; and on each of Counts 7 through 13, he received a sentence of five years imprisonment. Since each sentence was concurrent, Giella's total sentence amounted to ten years imprisonment and a $10,000.00 fine. From their convictions, each defendant now appeals. We affirm.

FACTS

This case arises from a series of transactions in which appellants are played a material part involving the fraudulent sale of gold bullion during the last five months of 1980.

In August, 1980, Heffington, as president of Heffington-Norman Investments, Inc., a registed brokerage firm in Wichita

Falls, Texas, contacted Billy Carr[1] to inquire about the possibility of attracting investors to purchase a large number of "miner's bars" of gold, which Heffington had heard Carr possessed and was trying to sell. The gold was allegedly stored at the Broward Commercial Warehouse in Fort Lauderdale, Florida, which was operated by co-defendant, Anthony Giella. In September, 1978, Carr delivered a large amount of product allegedly gold, to the warehouse. According to Giella, Carr at that time showed him a bar from one of the many cases delivered to the warehouse which appeared to be gold bullion. From this time, Giella asserts that at all times he believed he was storing gold in the warehouse. According to the terms of the Carr-Giella storage agreement, Giella would receive a bonus of approximately $500,000.00 when and if the gold bullion were sold. With this inducement, Geilla wrote warehouse receipts for Carr reflecting whatever Carr requested and with apparently no knowledge that there was any truth to the receipts.

In September, 1980, Heffington met Carr and others in McAllen, Texas, where they worked for several weeks in an effort to

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1. William Carr was named along with Appellants in the thirteen-count indictment as a co-defendnat. Upon motion, however, his trial was severed from the instant one and, according to counsel at oral argument, a plea bargaining agreement was eventually entered into.

secure investors for the gold. While in McAllen, Heffington observed Carr draft two letters that purported to be from Giella as president of Broward Commercial Warehouse and purported to be to Heffington as president of Heffington-Norman Investments. These letters were typed on Broward Commercial Warehouse stationery and stated that Carr had released and transferred one hundred tons of gold to Heffington-Norman Investments and that the warehouse was awaiting Heffington's instructions concerning storage of the gold.

Having failed to secure investors in September, Carr and Heffington met with co-defendant Russell White, at Terrell, Texas, in October, 1980. Heffington entered into a contract with White for the sale of 3,500,000 ounces of gold, title to remain in Heffington until funds were received. Heffington also gave White a letter which purported to assign fifty-three containers of Heffington-Norman Investment, Inc.'s gold at Broward Commercial Warehouse to R. P. White & Associates as a guarantee of Heffington-Norman's performance under the contract. Attached to the letter were copies of the forged Giella letters form McAllen, Giella's phony Broward Commercial Warehouse receipts, Broward Commercial Warehouse bills of lading and an affidavit from Carr stating that the copy of the warehouse receipts was a true copy of a certified warehouse receipt. Using these documents, White attempted to locate people who would invest in the gold. White lodged the documents with Sam Wagliardo at Security Trust Company in Dallas, Texas.

In December, 1980, White lined up several investors to purchase gold. Thomas E. White of Seattle, Washington, tendered a $325,000.00 cashier's check to co-defendant R. P. White as his investment in the gold deal. William R. Wallace, together with Wesley T. McVey and an associated group of investors, agreed to invest $200,000.00 into the gold. Since the purchase price was only $400,000.00, it was agreed that Security Trust Company would refund $125,000.00 to White after the transfer of the gold, giving each set of investors one-half interest in the gold. Both Wallace and Thomas E. White had examined the documents at Security Trust Company and relied upon them as evidence of the existence of the gold.

Defendant R. P. White received Thomas E. White's $325,000.00 cashier's check on Saturday, December 20, 1980, and deposited it the following Monday in his account at the American National Bank in Terrell, Texas. Within two days, White disbursed $225,000.00 to Carr, who transferred $125,000.00 to Giella. The remaining $100,000.00 was spent by defendant White by December 30, 1980, for personal debts and real estate. Wallace and McVey made some seven wire transfers from Reno, Nevada, to Dallas of their funds on December 29 and 30, 1980. These transfers amounted to $155,000.00. The following day the remaining $45,000.00 in Wallace funds was received at Security Trust Company in the form of a cashier's check. Of this amount, Heffington took $150,000.00 on December 30, 1980.

It was agreed that the gold would be delivered by January 21, 1981. The

investors, however, soon learned that there was a problem in the paper flow hindering delivery. On January 5, 1981, Heffington introduced Wallace and McVey to defendant Carr for the first time. At this time Carr tendered to the investors a phony bill of lading and invoice which had been typed for him by Heffington stating that the gold had been flown to Canada for the account of Heffington-Norman Investments. Heffington observed Carr forge signatures on these documents. When the gold never turned up in Canada, the investors reported their loss to the FBI making criminal complaints against all persons associated with the transaction. Subsequent investigation resulted in the indictment of appellants.

ISSUES

It is not surprising that after a lengthy trial by jury in the district court, a number of issues are raised on appeal. We set forth these issues according to the parties who have raised them.

Issues Raised By All Parties

(1) Whether the trial court erred in denying the appellants' motion to dismiss the indictment based on prosecutorial misconduct before the grand jury.

Issues Raised By Heffington and Giella

(2) Whether appellants' Fifth and Sixth Amendment rights were violated by the trial court's refusal to grant appellants' motion for "use immunity" for co-defendant William Carr.

(3) Whether the Double Jeopardy clause of the Fifth Amendment was violated by the conviction and sentence of the appellants on multiple "wire fraud" counts.

Issues Raised By Heffington Only

(4) Whether the evidence was sufficient to support Heffington's conviction.

(5) Whether the district court erred in denying Heffington's motion for continuance allegedly to obtain "conflict-free" counsel.

(6) Whether Heffington's Sixth Amendment right of confrontation was violated by admission of a co-defendant's hearsay statement.

Issues Raised By Giella Only

(7) Whether the evidence was sufficient to support Giella's conviction on the substantive counts since arguably such acts set out in the counts could not have been reasonably foreseen as the necessary or natural consequences of the unlawful agency of the conspiracy.

(8) Whether the trial court's jury instructions on conspiracy where adequate and proper.

(9) Whether the trial court erred in denying Giella's motion to strike testimony which was offered under the co-conspiratorial exception to the hearsay rule.

Issues Raised By White Only

(10) Whether the evidence was sufficient to support White's conviction for conspiracy.

1. PROSECUTORIAL CONDUCT BEFORE GRAND JURY

Appellants assert that the district court erred in denying appellants' motion to dismiss the indictment for the reasons that (1) the Assistant United States Attorney uttered inflammatory and prejudicial remarks to the jury, commented on the evidence and violated the independence of the grand jury and (2) the prosecutor became a witness and testified during the presentation of the case to the grand jury and, thus, was an unauthorized person under Fed.R.Crim.P. 6(2)[2] in the grand jury room. It is to be noted that appellants' arguments are based upon only that portion of the grand jury record, the testimony of FBI agent Eugene L. Gee, which was made available to appellants for review. The entire transcript of the grand jury testimony was sealed by the district judge

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2. Fed.R.Crim.P. 6(d) provides:
Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

and is contained within the record on appeal.

[1] The Fifth Amendment to the United States Constitution provides that, "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of the grand jury." Nothing more is constitutionally required of an indictment than that it be "returned by a legally constituted and unbiased jury." Costello v. United States, 350 U.S. 359, 363, 76 S.Ct. 406, 409, 100 L.Ed. 397, 402-3 (1956)(emphasis added). The role of a prosecutor is to direct the grand jury in its investigation, but to avoid taking control of such inquiry. United States v. Cosby, 601 F.2d 754, 758 (5th Cir. 1979). Improper remarks made by a prosecutor can only justify dismissal of the indictment if such remarks so biased the grand jurors that their votes were based upon their bias. United States v. Cathey, 591 F.2d 268 (5th Cir. 1979).

[2] The court has carefully reviewed the entire transcript of the grand jury testimony and agrees with the district court that the actions of the prosecutor were clearly within the bounds of the prosecutor's role in a grand jury proceeding and that such actions could not have prejudiced or biased the grand jury in its independent role. It is evident from a reading of the entire text of discussion between the grand jurors that the prosecutor and the prosecutor's remarks to the effect that he thought he "could prove beyond a reasonable doubt" the elements set forth in the indictment had no prejudicial effect upon the grand jurors. The statement arose in a discussion concerning the process in which an indictment was

drafted, and the prosecutor emphatically admonished the grand jurors, "I mean this one hundred percent. Simply because I think [this], I don't want to influence your vote. You've got to vote extremely independently on this on your own conscience from what you've heard." Furthermore, the conveyance by the prosecutor of his impression as to the guilt or innocence of a defendant does not necessarily, and in this case did not, create a bias. United States v. Cederquist, 641 F.2d 1247, 1353 (9th Cir. 1981).[3] There is likewise no merit to other challenges by appellants of alleged inflamatory remarks by the prosecuting Assistant United States Attorney.

Nor do we agree with appellants' assertion that the prosecutor in his role directing the inquiry assumed the dual role of a witness and thereby became an "unauthorized" person under Fed.R.Crim.P. 6(d) when he remained before the grand jury performing his duties as prosecutor. In each of the three episodes cited by appellants, the prosecutor was summarizing the testimony and evidence already[4] before the grand jury and, in one case, leading a

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3. In the words of the Ninth Circuit,
Grand Jurors, as a practical matter, however, are aware that a case is being presented to them because the prosecutor feels that an indictment is warranted. Thus the fact that a prosecutor conveys such an impression to the grand jury does not require the dismissal of the indictment.
641 F.2d at 1353.

4. See Grand Jury Testimony of Eugene L. Gee, 54-55.

witness to respond to a grand juror's question. These actions did not propel the prosecutor into the role of witness. Our review of the remaining grand jury testimony reveals no prosecutorial misconduct warranting dismissal of the indictment. Accordingly, appellants' first claim must fail.

2. DENIAL OF USE IMMUNITY

[3] Appellants Heffington and Giella assert that the district court's refusal to grant use immunity to former co-defendant William Carr precluded them from introducing exculpatory evidence and violated their Sixth Amendment right to compulsory process and their Fifth Amendment right to due process (only Giella asserts the latter). In this case, prior to requesting the court to grant use immunity to Carr, appellants subpoenaed him to appear as a witness. Carr moved to quash the subpoena and such was granted by the district court after considering appellants' request for use immunity. The subpoena was quashed because Carr's counsel indicated to the court that, if called, Carr would exercise his Fifth Amendment privilege against self-incrimination. Appellants assert that the refusal of the trial court to grant use immunity precluded them from presenting to the jury testimony which would have exculpated them. Such action, it is alleged, violated their Fifth and Sixth Amendment rights. Appellants urge this Court to adopt the five-prong test set forth by the Third Circuit in Government of Virgin Islands v. Smith, 615 F.2d 964 (3rd Cir. 1980) establishing when a district court should properly order use immunity. For the reasons below, however, we decline.

In United States v. Herbst, 641 F.2d 1161 (5th Cir. 1981), cert. denied, ____ U.S. ____, 102 S.Ct. 292, 70 L.Ed.2d 141 (1981), this Court, when faced with a similar allegation expressly declined to follow the Third Circuit decision in Virgin Islands stating among other things, that the Third Circuit view was the minority view. Indeed, even the Virgin Islands court recognized the serious intrusion into the realm of the Executive Branch presented by requiring a court to grant immunity. Keeping such in mind, this Court recently stated in United States vs. Thevis, 655 F.2d 616, 639 (5th Cir. 1982), cert. filed, Docket No. 81-2073 (May 10, 1982):

> We conclude, however, after reviewing the various circuit opinions anc conflicting policy arguments, that district courts may not grant immunity to defense witnesses simply because the witness has essential exculpatory information unavailable from other sources.

We do not believe, therefore, that the district court erred in refusing to grant use immunity to witness William Carr.

3. DOUBLE JEOPARDY

[4] Heffington and Giella next assert that their convictions on multiple counts of wire fraud violated the Double Jeopardy

clause.[5] The particular transaction giving rise to these convictions was the multiple transfer of funds of investors Wallace and McVey from the First National Bank in Reno, Nevada to Republic National Bank in Dallas. Appellants assert that the intent necessary for conviction on each separate offense was not present since neither party foresaw nor intended the seven transfers to be made and had no control over the fact that the funds were transferred seven different times. Appellants further assert that the same identical evidence was offered on each of the separate counts and, therefore, under the test set forth in Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 221, 53 L.Ed.2d 187 (1977), the absence of differing evidence on each count precluded multiple conviction.

The law is clear, however, that each separate use of wire communications constitutes a separate offense under § 1343. United States v. Crockett, 534 F.2d 589 (5th Cir. 1976); Henderson v. United States, 425 F.2d 134 n.4 (5th Cir. 1970). Furthermore, with respect to each of the wire fraud counts, separate records of separate and distinct wire transfers of funds from different investors were admitted into evidence to prove each separate

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5. Pursuant to the concurrent sentence doctrine, see United States v. Ortiz, 610 F.2d 280 (5th Cir.), cert. denied, 445 U.S. 930, 100 S.Ct. 1320, 63 L.Ed.2d 764 (1980), we need not decide this question. Since we find no merit to appellants' claim, however, we set forth our reasoning below.

offense. Accordingly, we find no double jeopardy violation.

4. SUFFICIENCY OF EVIDENCE-HEFFINGTON

[5] Turning to those issues raised solely by appellant Heffington, he first contends that the evidence wholly failed to establish the essential elements of agreement or intent necessary to sustain his conviction. This contention is without merit. Viewing the evidence in the light most favorably to the Government and making all reasonably inferences and credibility choices which will support the verdict, United States v. Escobar, 674 F.2d 469, 476-77 (5th Cir. 1982), it is apparent that there is substantial evidence of guilt. The evidence established that Heffington was aware of the forged documents held in trust at the Security Trust Company and that he conveyed to others that these documents were valid. It was Heffington who demanded the investors to transfer $525,000.00 in funds rather than the $400,000.00 price originally agreed on. In contracts with White and Wallace, Heffington verified the authenticity of each document knowing such documents to be less than genuine. The jury's verdict with respect to Heffington is clearly supported by the record.

5. CONFLICT OF INTEREST

[6] Heffington also contends that the trial court denied his Sixth Amendment right to counsel when it denied his motion for continuance. Heffington asserts that the purpose of requesting a continuance was to give him time to obtain conflict-free

counsel. The facts as establisehd by affidavits reveal that Heffington retained James Rolfe as counsel to represent him, he was the nominee for the position of U.S. Attorney in the Northern District of Texas. Heffington asserts that his Sixth Amendment right to counsel entitles him to the services of an attorney who is untrammeled and can represent his client with unimpared assistance, free of any detrimental conflict of interest. Such untrammeled representation, Heffington claims, is not possible where the attorney is anticipating confirmation to a position directly opposite to that for which he was retained to represent the defendant.

Heffington's argument, however, contains a fatal flaw. The motion for continuance, read as a whole, simply does not reflect that appellant sought a continuance to obtain conflict-free counsel. Rather, the motion and accompanying affidavit quite vividly reveal that Heffington requested a continuance because he had only recently regained possession of his records which he needed in order to prepare his defense and because problems in his brokerage firm had consumed too much of his time to permit him to adequately prepare his defense. An accurate reading of the affidavit reflects that Heffington was informing the court that if his continuance were granted he would have to obtain new counsel since Rolfe would not be able to continue representing him following his confirmation as U.S. Attorney. Heffington never expressed any alarm or concern over a possible conflict, only that Rolfe acknowledged that appearance of a conflict would be avoided if appellant secured other counsel. Since

there is no record of Heffington's belief that a conflict of interest existed Heffington's claim must fall. The claim which Heffington raises now on appeal is one which was never presented to the district court. Rather, if appellant wishes to pursue his claim of conflict of interest, then an application for post-conviction relief pursuant to 28 U.S.C. § 2255 is available to him.

6. ADMISSION OF GIELLA'S HEARSAY STATEMENTS

Heffington finally argues that the district court's admission of certain out-of-court declarations of co-defendant Giella violated Fed.R.Evid. 801(d)(2)(E) (the "co-conspirator exception") and his Sixth Amendment right to confrontation as delineated in Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.E.2d 476 (1968). Specifically, the statements to which Heffington objects include Giella's testimony before the grand jury and his assertions to a special investigating FBI agent, David Israelson. According to appellant, this testimony revealed to the jury that Carr habitually filled out false warehouse receipts, bills of lading, and letters concerning the gold on warehouse stationery and that Giella signed his own name to documents without any personal knowledge of the truth of the contents. This, appellant asserts, was the only direct proof that the gold actually did not exit or at least was never stored at the warehouse, and was the only evidence tending to show that the jointly tried co-defendant shared in the knowledge that the warehouse receipts were false.

[7] Initially, we note that these statements which were introduced for consideration with respect to Giella only were not, as Heffington asserts, admitted under the co-conspirator exception of Fed.R.Evid. 801(d)(2)(E). They were clearly admissible as statements by defendant Giella pursuant to Fed.R.Evid. 801(d)(2)(A) and the district court so held.[6] Tr.Record 1519.

[8] Furthermore, neither the testimony before the grand jury nor the statements to Agent Israelson violated the rule of Bruton. The testimony to which Heffington objects involved little or no reference

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6. The district court gave no specific grounds for admitting such testimony at the time it was proffered. With respect to the testimony of Agent Israelson, the court merely overruled defense counsel's objection that Israelson's interview violated the defendant's Miranda rights.

   Defendant raises no similar objection on appeal. With respect to the grand jury testimony, defense counsel's objection can be read to raise both co-conspirator and Burton problems. The court's limiting instruction to the jury that such testimony was admissible only against the defendant Giella suggests that the court was admitting the evidence pursuant to Fed.R.Evid. 801(d)(2)(A). At that close of trial, the court reconfirmed this when making more precise "findings for the record." Tr. Record 1519.

to Heffington's participation in the scheme. The prosecutor was careful to avoid any references to Hefington which the jury might consider inculpatory. The district court was also mindful of the Bruton rule and indeed on one occasion instructed the prosecutor upon timely objection to move on so as to avoid a possible violation. THe statements were highly probative in that they tended to establish Giella's knowledge of the fraudulent scheme, and they were clearly admissible for this purpose. "Bruton rights are violated only by admission of extrajudicial statement implicating the complaining defendants." United States v. Castro, 596 F.2d 674, 677 (5th Cir.), cert. denied, 444 U.S. 963, 100 S.Ct. 448, 62 L.Ed.2d 375 (1979). In a case such as this, where a statement does not directly allude to the defendants, no rights are abridged. See id. and cases cited therein. Since we find no error in Heffington's trial and conviction, the judgment of the district court with respect to Heffington is AFFIRMED.

7. SUFFICIENCY OF EVIDENCE-GIELLA

[9] Turning to those arguments raised soley by Giella, appellant first contends that the evidence is insufficient to support his conviction on Counts 2 through 5 and 7 though 13 in that the record reveals no evidence indicating that the acts alleged in those counts could be reasonably foreseen as a necessary or natural consequence of the unlawful conspiracy. In Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed.2d 1489 (1946), the Supreme Court held

that a conspirator could be found guilty of a substantive offense based upon acts of a co-conspirator done in furtherance of the conspiracy except where the act of the co-conspirator did not fall within the scope of the unlawful project or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement. Implicitly relying upon his position as operator of the warehouse and the fact that he never dealt with the purchasers in this transaction, Giella asserts that the record is devoid of any evidence which would support the jury's conclusion that he at any time had a basis in which to reasonably expect or foresee that the purchasers would travel in interstate commerce (Counts 2 through 4), that a cashier's check would be placed in interstate commerce (Count 5) or that the wire transactions (Counts 7 through 13) would ever take place. Appellant further claims that the most persuasive evidence indicating the insufficiency of the evidence to support the jury's verdict with respect to him is the fact that the jury found Russell White not guilty on the substantive counts. According to Giella, the evidence as to the participation and knowledge of Russell White in the alleged conspiracy is far more extensive and of greater weight than the minimal evidence of participation of Giella in the alleged conspiracy.

The record, however, reveals that sufficient evidence existed to establish the foreseeability of the actions charged in

the substantive counts as being the necessary or natural consequences of the unlawful agreement. First, testimony revealed the interstate nature of this transaction. Giella himself travelled tc New York City in August, 1980 where he met Heffington and two gold contracts were signed. He travelled to McAllen, Texas in September, 1980, where he learned that Carr was negotiation various transactions with Mexican investors. Additionally, there was discussion with respect to gold transaction documents to be used in London. Giella himself directly caused four cashier's checks to travel in interstate commerce when he received them in Tyler, Texas, transported them to Florida and ultimately deposited them in New York bank accounts. The evidence of the national and international scope of this transaction, as well as the interstate movements of participants and funds, all of which was known to Giella, was clearly sufficient for the jury to find that the acts in all of the substantive counts were the reasonably foreseeable natural consequences of the conspiracy to defraud. The jury's verdict with respect to White is irrelevant.

8. THE CONSPIRACY INSTRUCTION

Giella next asserts that the district court erred in refusing to instruct the jury on the conspiracy count as requested by defendant in his proposed charge. The district court declined to submit the following charge tro the jury: "mere knowledge, approval or acquiescence in the object or purpose of a conspiracy is insufficient to prove participation in it, and further, mere presence a the scene of a

crime or mere association with members of a conspiracy is not enough to sustain a conviction for a conspiracy." Giella claims that had the court instructed the jury properly, the jury may well have found that he was merely present at the time of certain activities and only associated with members of the conspiracy without willfully and knowingly joining in it. The failure of the court to submit these charges to the jury, Giella asserts, denied him a fair trial and due process under the Fifth Amendment.

[10, 11] This contention is without merit. When reviewing a trial court's refusal to charge a requested instruction, we consider the jury charge as a whole in light of the evidence presented and arguments of counsel. United States v. Kerley, 643 F.2d 299, 303 (5th Cir. 1981). So long as the charge accurately reflects the law and facts, the district judge is vested with broad discretion in formulating his charge, and this Court will not lightly disturb his judgment. United States v. Ruppell, 666 F.,2d 261 (5th Cir.), cert. denied, ____ U.S. ____, 102 S.Ct. 3487, 72 L.Ed.2d ____, 50 U.S. L.W. 3998.19 (June 28, 1982). In this case, the court instructed the jury that they had to find that the defendant knowingly did an act which the law forbade and, that he knowingly and willfully joined in the unlawful conspiracy. The court additionally instructed the jury that "mere presence at the scene of the alleged transaction or event, or mere similarity of conduct among various persons and the fact that they may have associated with each other and may have assembled together and

discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy but happens to act in a way which advances some object or purpose of the conspiracy, does not thereby become a conspirator." Read as a whole, it is clear that the court's instructions were proper.

9. CO-CONSPIRATORIAL TESTIMONY

[12] Giella finally contends that the district court erred in permitting the government to introduce testimony of co-conspirators Heffington and White against Giella. He claims that the district court improperly relied upon Giella's own statements as independent evidence when making the necessary findings dictated by this Court's opinion in United States v. James, 590 F.2d 575 (5th Cir. 1974), supporting admissibility of the

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7. In United States v. James, the en banc court addressed the issue of the effect of the then newly-adopted Fed.R.Evid. 801 on the traditional co-conspiratorial hearsay exception. The court held that admission of co-conspiratorial statements is premised upon a showing (1) that a conspiracy existed; (2) that the statements were made in furtherance of the conspiracy, and (3) that the defendant and declarant were members of the conspiracy. The court further held that the existence of the prerequisites was to be determined by the trial judge. The court stated that, whenever reasonably practicable, the district

statements pursuant to Fed.R.Evid. 801(d)(2)(E).

Appellant's asserted error is controlled by this Court's holding in United States v. Fredericks, 586 F.2d 470 (5th Cir.), cert. denied 440 U.S. 962, 99 S.Ct. 1507, 59 L.Ed.2d 776 (1979), where we stated,

> The Government must produce independent evidence both that the conspiracy existed and, with respect to any defendant co-conspirator against whom the statements are admitted, that he or she was a member of that conspiracy. The Government may use, however, any otherwise admissible evidence in

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> judge should require the showing of a conspiracy and of the connection of the defendant with it before admitting declarations of a co-conspirator. As a preliminary matter, the offering party must establish by substantial, independent evidence the xistence of a conspiracy, at least enough to take the question to the jury. Regardless of whether the proof has been made in the preferred order, or the statement has been admitted subject to later connection, on appropriate motion at the conclusion of all the evidence the court must determine as a factual matter whether the prosecution has shown by a preponderance of the evidence independent of the statement itself the necessary prerequisites to dmission of the co-conspiratorial statements.

> meeting this threshold burden of production, including--with respect to any particular defendant--any out-of-court statements made by that defendant in the presence of a witness testifying under oath.

Id. at 475-76 (footnotes omitted; emphasis in original). There was no error in the district court's consideration of Giella's own statements as independent evidence that the conspiracy existed and that he was a member thereof. This evidence together with other evidence summarized by the trial court was sufficient to satisfy the James standard and the conditions for application of Rule 801(d)(2)(E). See id. Accordingly, of the judgment of the district court with respect to defendant Giella is AFFIRMED.

10. SUFFICIENCY OF EVIDENCE -- WHITE

[13] Unlike co-defendants Heffington and Giella, Russell White was convicted only upon the conspiracy count; he was found not guilty on all substantive counts. White asserts that the evidence in this case was insufficient to establish that he knew of or participated in the conspiracy and the verdicts rendered by the jury are indicative of the lack of sufficient evidence. Appellant claims that his participation in the act bringing about the fraud was evident in the record; therefore, the only basis for the verdicts of acquittal on the substantive counts was the lack of sufficient evidence to establish White's knowing and willful participation in the fraudulent scheme. Appellant contends that it is this same lack of evidence on the

knowledge issue that is probative of his innocent participation in the conspiratorial scheme.

Appellant's assertions arguably raise some questions as to the consistency of the jury's verdicts; however, we note that consistency of verdicts is not required. United States v. Cargo Service Stations, Inc., 657 F.2d 676, 685 (5th Cir. 1981), cert. denied, ___ U.S. ___, 102 S.Ct. 1712, 72 L.Ed.2d 135 (1982). Moreover, rigid consistency of verdict is not necessary in a multicount indictment as long as the conviction is adequately supported. United States v. Bottom, 638 F.2d 781 (5th Cir. 1981). The evidence established that White netted approximately $100,000.00 from the conspiracy. It also established that White was aware that Heffington was merely an agent of Carr and that he neither owned nor controlled any gold. Notwithstanding this fact, White lodged various documents with Security Trust Company which he knew mistakenly reflected that Heffington-Norman Investments, Inc. had title and control of the gold. With these documents, White succeeded in persuading the victims in this suit to invest in the gold transaction. viewing the evidence in a light most favorable to the government, we find the evidence sufficient to convict White, and accordingly, his conviction is AFFIRMED.

AMENDMENT V - CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI - JURY TRIAL FOR CRIMES AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-1296

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
WALTER MERLE HEFFINGTON,
RUSSELL PRESTON WHITE, JR.,
and ANTHONY FRANK GIELLA,
Defendants-Appellants.

Appeals from the
United States District Court
for the
Northern District of Texas

ON PETITIONS FOR REHEARING
(August 30, 1982)

Before GARZA, POLITZ and WILLIAMS,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied.

ENTERED FOR THE COURT:

HENRY A. POLITZ (signature)
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-1296

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versus
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RUSSELL PRESTON WHITE, JR.,
and ANTHONY FRANK GIELLA,
Defendants-Appellants.

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for the
Northern District of Texas

JUDGMENT

Before GARZA, POLITZ and WILLIAMS, Circuit Judges.

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

August 2, 1982

ISSUED AS MANDATE: September 9, 1982